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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974
No. 74-1348

ROBERT WAYNE AUSTIN,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE L. SENDAK
Attorney General of Indiana

WESLEY T. WILSON
Deputy Attorney General

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6335
Attorneys for Respondent

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Attorneys for Respondent

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OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in Austin v. State, (1974) __Ind.__, 319 N.E.2d 130, and is correctly reproduced in Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Defendant (Petitioner) was denied due process of law by the admission of evidence of other similar alleged criminal offenses at his trial.

(The Respondent deems additional language set out by Petitioner under this heading as comprehended in the above statement and as surplusage.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Articles of Amendment V and XIV)

and the Indiana Statutes (IC 35-1-55-1, 35-14-4-3, and 35-1-89-1) are correctly set forth on pages 3-5 of the Petition, except that the Respondent deems the Sixth Amendment of the Constitution of the United States not involved in this case and the Indiana statutes are pertinent only to show the nature of the crime with which Defendant (Petitioner) was charged and neither their validity nor their interpretation has been questioned herein by Petitioner.

STATEMENT OF THE CASE

1. Statement of the Facts.

Melinda Sue Stanbaugh was a student at Indiana State University in Terre

Haute, Indiana. On November 7, 1972, at about eight p.m., she went to Jones Hall, a dormitory on the campus to study with some girl friends. About one o'clock a.m., on November 9, 1972, she left Jones Hall to return to her own dormitory, Burford Hall. When she reached a point in front of Erickson Hall, Defendant drove up in a car, stopped in the middle of the street, got out, and came over to her. He seized her by the arm and said he wanted to talk to her, she replied that she did not want to talk to him and that she was on her way home (Tr.pp.679-686).

Defendant then put his arm around her neck, pulled her over to his car,

and put her in it. He drove to State Road 63, out Road 63 toward Clinton until he came to a gravel road, and to the right on the gravel road until it came to a dead end. There he stopped and attempted to kiss Miss Stanbaugh, but she turned her head and prevented him. He told her she had a pretty face and a nice body and he would hate to mess them up. He then began choking her and, at the same time, removing her clothing. After he had completely disrobed her, he removed his own clothing (Tr.pp.686-716).

He then attempted to suck one of her breasts, but she pushed him away. He then dropped to the floor of the

car and began to commit cunnilingus on her. She tried to push him away and kicked him and he became angry and bit her leg. After about ten minutes of attempted cunnilingus, he slid her down on the seat of the car and attempted to have sexual relations with her, but was unable to do so because he was unable to obtain an erection. He then forced her to commit fellatio and, when he obtained an erection by this method, he again laid her down and raped her. During the fellatio, he inserted his fingers in both her rectum and her vagina (Tr.pp.716-720).

During all these activities, Miss Stanbaugh was crying. Defendant

finally permitted her to dress and drove her back to the campus, letting her out at her dormitory, and told her he might call her Thursday night. This was about four o'clock in the morning. Inside the dormitory, Miss Stanbaugh called the security police, who took her to the infirmary (Tr.pp.720-723).

About nine-fifteen that evening, Suzanna Little, another student of the University left the Home Economics Building and started across the campus. Defendant accosted her and asked her if she "knew where George lived." She became frightened and ran (Tr.pp.560-562).

Between nine-thirty and ten o'clock,

Defendant accosted Bonnie Dianne May on the campus, saying he wanted to talk to her, and forced her into his car. He drove out toward Clinton until he came to a gravel road and then down this side road. He stopped the car, forced her to commit fellatio and then raped her (Tr.pp.616-618).

2. Legal Proceedings.

Defendant was charged with sodomy, rape, and kidnapping of Bonnie Dianne May in the Vigo Circuit Court. On trial, he was found guilty of all three counts and sentenced to imprisonment for two to fourteen years for sodomy, two to twenty-one years for rape, and life for kidnapping. His conviction

was appealed by him to the Supreme Court of Indiana and by that Court affirmed.

Miss Stanbaugh and Miss Little both testified to their adventures with Defendant, to which testimony Defendant objected and moved to have stricken because he was only charged with offenses against Bonnie Diane May and not against Belinda Sue Stanbaugh and Suzanne Little and for the reason that the testimony of Miss Stanbaugh concerned events of November 7, 1972, and he was charged with an offense committed on November 8, 1972 (although Miss Stanbaugh's contact with Defendant did not occur until one o'clock in

the morning of November 8, 1972.

James Michaels, a police officer, testified that Defendant told him that his satisfaction from forcible rape had begun four or five years before when he forced a girl with whom he was living to have sexual relations with him, when he could have had such relations with her amicably without the use of force (Tr.p.893). Defendant objected and moved to strike such testimony on the ground that it was too remote in time to be material to the case.

SUMMARY OF THE ARGUMENT

Defendant was not denied due process of law by the admission of evidence

of other similar alleged offenses at his trial because:

1. Defendant's accosting of Miss Little and rape of Miss Stanbaugh occurred in the same general location and so close in time to the crimes of which he was charged as to be part of a general campaign of sexual violence and part of the res gestae.

2. Evidence of other sexual crimes by the accused is admissible in a prosecution for rape.

3. Evidence of the rape of Miss Stanbaugh and the accosting of Miss Little proved Defendant was in the area where the attack on the prosecutrix occurred on the day it occurred.

4. James Michael's testimony of Defendant's account of his forcible sexual relations with a mistress four or five years before and his statement that that was when his fondness for forcible rape began was admissible as evidence of Defendant's proclivity for rape.

ARGUMENT

DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION OF EVIDENCE OF OTHER SIMILAR ALLEGED OFFENSES AT HIS TRIAL.

Although Defendant speaks of denial of "due process and fair trial" in his first proposition and has a second proposition questioning the "exercise of judicial discretion," all his con-

tentions can be comprehended in the term "denial of due process of law" and will be so treated herein.

Defendant begins his argument by urging "the basic standard enunciated by the court in Lovely v. United States, 169 Fed.2d 386 (4th circ. 1948) that a person on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony." In that case the defendant was convicted of taking a woman to a secluded spot on a military reservation and raping her and error was charged in the admission of evidence

that fifteen days prior to this alleged rape, defendant had taken another woman to a secluded spot on the reservation and raped her. The Court said in part:

> "We think there can be no question but that the admission of this testimony was reversible error. There was no issue of identity in the case, nor of knowledge, motive or intent, and the crime was not of the sort, like a stock swindling scheme or murder for insurance, where the commission of other crimes may tend to establish a plan from which the crime charged can be said to have resulted. The accused had admitted that he had had prosecutrix out in his car on the occasion in question and she had testified that he had ravished her at that time. There was no suggestion that any one else had ravished her; and upon his statement to the F.B.I., the only question was whether he had had carnal knowledge of her forcibly and against her will. The fact,

if it was a fact, that he had ravished another woman some weeks before threw no light upon that question. * * *

"It is true, of course, that evidence which has a reasonable tendency to establish the crime charged in the indictment is not rendered inadmissible merely because it establishes another crime; and the question which arises with respect to this sort of evidence is whether or not it has such tendency. In ordinary cases it is perfectly clear that evidence of other crimes committed by the accused has no such tendency, and is properly excluded as irrelevant. Evidence of the commission of similar offenses closely related in time and place may, however, be relevant on such matters as identity, guilty knowledge, motive or intent, where these are in issue, or may tend to establish a criminal plan or design out of which the crime charged has originated. * * *"

It is clear that the decision in Lovely rests solely on the fact

that the defendant admitted sexual relations with the prosecutrix, contending only that it was with her consent, thereby removing the issues of identity and intent from the case and that the decision would have been different had defendant, as in this case, denied that he was the man who committed the rape. Such a rule is fraught with potential injustice. A defendant whose conviction is certain and against whom evidence of other similar crimes has been introduced to show his identity or intent has only to take the stand and admit sexual relations with the prosecutrix at the time and place charged to be assured

that his conviction will be reversed.

However, Lovely is not applicable to this case. Defendant did not admit sexual relations with the prosecutrix and his identity was very much an issue. The rape of Miss Stanbaugh took place on the same calendar day as that of Miss May, in an identical manner and at substantially, if not exactly, the same place. The accosting of Miss Little took place on the same college campus only a half hour before the kidnapping and subsequent rape of Miss May. Both of these incidents come within the exception set out in Lovely of "similar offenses closely related in time and place."

In United States v. Windsor, (1969) 417 Fed.2d 1131, Lovely was cited by the Court as authority for the statement:

> "However, it is the long-settled rule that evidence of criminal conduct not alleged in the indictment may be adduced when it is closely related in time and place and tends to establish a plan or design out of which the crime charged originated."

In United States v. Smith, (1971) 446 Fed.2d 200, on the authority of Lovely, the Courts said:

> "While evidence of the commission of another offense is not admissible to show criminal propensities in the person on trial, such evidence is admissible where it tends to establish a common scheme, plan, system, or design, or where it is so related to the crime charged that it serves to establish motive, knowledge, intent, or the

absence of mistake or accident."

In both the Stanbaugh rape and the May rape, Defendant forced the victim into his car, after stopping her on the pretense that he wished to talk to her. In both instances, he drove out of town toward Clinton to a gravel road and stopped on this gravel road. In both instances, he forced the victim to prepare him for the rape by fellatio.

The statement by Defendant to police of his forcible sexual relations with his mistress four or five years before followed his confession of the rape with which he was charged and was given by him to the police as an

explanation for his preferance for sexual relations obtained by force. It establishes that the rape of Miss May, that of Miss Stanbaugh, and his accosting of Miss Little, all on November 8, 1972, were all part of a habitual life pattern deliberately and willfully established by him by the first sexual attack on his mistress four or five years before.

In Brent v. White, (D.C.La., 1967), 276 Fed.Supp.386, Aff. 398 Fed. 2d 503, cert. den. 393 U.S. 1123, 89 S.Ct. 998, 22 L.Ed.2d 130, the prosecution in a rape case was permitted to introduce evidence of a prior conviction of the defendant of a

similar offense against another victim, which admission of evidence was approved both by the Louisiana Supreme Court and by the Federal Courts on a petition for a writ of habeas corpus. The District Court said:

> "The purpose of the testimony concerning the prior conviction was to show that the approach used by the petitioner on a prior occasion, involving a different victim, was a similar approach to that alleged by the complaining witness to have been used in this case.
>
> "Whether or not the introduction of this evidence violated the law of the State of Louisiana is of no moment in this habeas corpus proceeding. The only question is whether or not it violated any federally protected rights. This question must be answered in the negative."

Impact is added to the Brent case

by the fact that it involved the rape of a white girl by a Negro and evidence was presented that in his previous conviction the victim was a white girl. There was no racial aspect to this case.

In State v. Crook, (1969) 253 La. 961, 221 So.2d 473, the defendant forced a young woman at gun point, as she was walking home from a bus line, to enter his car, drove her to another part of town, raped her, and then returned her to the same area where he had picked her up. The Louisiana Supreme Court held there was no error in permitting the State to introduce evidence that he had raped

another woman in exactly the same manner five nights previous. The United States District Court for the Eastern District of Louisiana in Crook v. Henderson, (1970) 310 Fed.Supp.200, denied a writ of habeas corpus, holding that the admission of such evidence did not deny the defendant any federal right.

In both Brent and Crook, the defendant had been sentenced to death, but the federal court held that his federal rights had not been violated by the admission of evidence of previous rapes, and in Brent, the Supreme Court of the United States denied an application for a writ of certiorari.

In Spencer v. State of Texas, (1967) 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606, a similar question was involved where three defendants alleged to be habitual criminals complained because evidence of their prior convictions was introduced in their trials on the current charges. Their convictions, which resulted in one being sentenced to death and other other two to life imprisonment, were affirmed by this Court.

The following excerpt from the Court's opinion summarizes the Court's view of the constitutionality of admission of evidence of other offenses in the trial for the current offense:

"* * * The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction, but they can be summarized broadly. Because such evidence is generally recognized to have potentiality for prejudice, it is generally excluded except when it is particularly probative in showing such things as intent. * * * an element in the crime, * * * identity, * * * malice, * * * motive, a system of criminal activity, * * * or when the defendant has raised the issue of his character, * * * or when the defendant has testified and the State seeks to impeach his credibility * * *

* * *

"This general survey sufficiently indicates that the law of evidence, which has been chiefly developed by the States, has evolved a set of rules designed to reconcile the possibility that this type of information will have some prejudical effects with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes. * * *

* * *

"Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. * * * But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and wide-spread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' * * *"

In the light of the opinion in Spencer, a consideration of the state rulings on the question is pertinent. In State v. Robbins, (1943) 221 Ind. 145, 46 N.E.2d 691, the Supreme Court of Indiana held that, where the chief element of an offense is illicit sexual relations, evidence of prior and subsequent sexual offenses by the defendant are admissible, subject to broad discretion of the trial court to exclude them for remoteness. In Meeks v. State, (1968) 249 Ind. 659, 234 N.E.2d 629, the same Court declined to follow Robbins and followed the decision in Lovely v. United States, supra. The prevailing rule in Indiana

is set forth in Miller v. State, (1971) 256 Ind. 299, 268 N.E.2d 299. In that case the Supreme Court of Indiana upheld the admission of evidence of another act of forcible sodomy by the defendant, who was charged with kidnapping, rape, sodomy, and automobile banditry. It distinguished that case from Meeks by pointing out that in Meeks the defendant admitted the act of intercourse but claimed it was with the victim's consent. The court quoted the following from Lamar v. State, (1964) 255 Ind. 104, 109, 195 N.E.2d 98, 101:

> "As an exception to the general rule, it is always permissible for the state, in actions involving

abnormal sexual intercourse, to introduce evidence as to other improper acts of sexual intimacy committed by the defendant.* * *

"In effect, then, evidence regarding other similar sex offenses is admitted as tending to support the credibility of the prosecuting witness as his testimony is related to the particular offense charged.* * *"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WESLEY T. WILSON
Deputy Attorney General

Attorneys for Respondent

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APPENDIX A
OPINION OF INDIANA SUPREME COURT

Robert C. Levinson
One Indiana Square, Suite 3300
Indianapolis, Indiana 46204
Counsel for Petitioner

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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OPINION OF INDIANA SUPREME COURT

ATTORNEY FOR APPELLANT

Robert Howard Brown
Rm. 11—28 South 5th Street
Terre Haute, Indiana

ATTORNEYS FOR APPELLEE

Theodore L. Sendak
Attorney General of Indiana

Henry O. Sitler
Deputy Attorney General
219 State House
Indianapolis, Indiana

IN THE
SUPREME COURT OF INDIANA

ROBERT WAYNE AUSTIN,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 1173 S 225
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable C. Joseph Anderson, Judge

PRENTICE, J.

Defendant (Appellant) was charged with the crimes of Sodomy, Rape and Kidnapping, all arising out of the abduction and abuses of the prosecuting witness by the defendant on November 8, 1972. He was found guilty on all counts and sentenced to imprisonment upon such charges respectively for terms of two (2) to fourteen (14) years, two (2) to twenty-one (21) years and life. His appeal presents four issues:

I. The admissibility of evidence of prior sexual offenses of the defendant.

II. The admissibility of testimony that the defendant had approached another woman shortly prior to the abduction of the prosecuting witness.

III. The admissibility of extra-judicial statements of the defendant made to a police officer during his incarceration and admitting a prior sexual assault.

IV. The denial of the defendant's motion for mistrial following a reference to a polygraph test by one of the State's witnesses.

• • •

The prosecuting witness was a college student. She lived on campus. In the early night hours, she left her dormitory to go to another building on campus. While crossing a public street, she was approached by the defendant who said he wanted to talk to her. He forced her into his automobile and drove to a secluded spot and there forced her to submit to sexual intercourse, fellatio and cunnilingus. The sufficiency of the evidence is not in issue.

ISSUE I. A State's witness, another woman student at the college, testified that in the early morning hours of the same day as the abduction of the prosecuting witness, the defendant forced her to submit to sexual intercourse and oral sex. Defendant objected to this testimony and moved to have it stricken, which objection and motion were overruled.

The general rule in Indiana for the admission of evidence of separate, independent and distinct crimes in establishing the guilt of a defendant is that such evidence is inadmissible except where relevant to show: (1) intent, (2) motive, (3) purpose, (4) identification, (5) common scheme or plan. *Watts* v. *State* (1950), 229 Ind. 80, 95 N.E. 2d 570, and cases there cited.

It has been held, however, that the above rule does not apply where the chief element of the offense is illicit intercourse between the sexes, and that such evidence of prior and subsequent acts is admissible subject to exclusion in the discretion of the trial court for remoteness. *State v. Robbins* (1943), 221 Ind. 125, 46 N.E. 2d 691.

The Robbins' decision was not followed in *Meeks* v. *State* (1968), 249 Ind 659, 234 N.E. 2d 629 and Judge Lewis writing for a unanimous Court and relying principally upon *Lovely v. United States* (1948), Cir Ct. of Appeals 4th Cir., 169 F. 2d 386, determined that an individual on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for any other felony. This Court subsequently declined to follow the Meeks decision in *Miller v. State* (1971), 256 Ind. 296, 268 N.E. 2d 299, wherein the court on a charge of rape by force, permitted a witness to testify that the defendant had raped her by force thirty-five days prior to the act charged. This Court distinguished Meeks as having been involved only with the issue of consent. Sodomy was not an issue. The writer of this opinion dissented therein and would, in the case at bar, exclude the evidence, but the majority has voted to follow the Miller decision.

ISSUE II. Another woman student at the college testified, over the defendant's objection, that she was approached by the defendant, approximately one-half hour prior to the time the prosecuting witness was abducted and in the same general area, and that the defendant on that occasion asked her if she knew where George lived. Although the defendant was not charged with any offense against this witness, her testimony was relevant in that it placed the defendant in the area at the approximate time the abduction occurred. Any fact which tends legitimately to connect the accused with the commission of the crime is admissible. *Elliott* v. *State* (1972),—— Ind. ——, 279 N.E. 2d 207, 209; *Pullins v. State* (1970), 253 Ind. 644, 647, 256 N.E. 2d 553; *Thomas v. State* (1968), 251 Ind. 76, 80, 238 N.E. 2d 20; *Forman* v. *State* (1938), 214

Ind. 79, 84, 14 N.E. 2d 546. See also, 29 Am. Jur. 2d, Evidence § 251; 22A C.J.S., Criminal Law §§ 606 and 610.

ISSUE III. Over the defendant's objection that it related to an event too remote to the issue, a police officer was permitted to testify that while the defendant was in his custody, the defendant voluntarily related to him that five years earlier he yielded to an urge to force sexual intercourse upon the woman with whom he was living and who would have readily consented. He related that he thought that this was when the urge to force intercourse first started with him. The evidence was relevant as reflective of the defendant's criminal intent. In this regard, we think the remoteness of the first instance of forcible intercourse was immaterial, because the admission of the defendant clearly indicated that the urge for forcible intercourse continued to the present time. Upon a specific objection for "remoteness," however, the trial judge has wide discretion; and the degree of remoteness goes to the weight and not to the admissibility of the evidence. *Garr v. State* (1967), 248 Ind. 295, 227 N.E. 2d 171, *Watts v. State* (1950), 229 Ind. 80, 104, 95 N.E. 2d 750; *Booher* v. *State* (1926), 198 Ind. 315, 321, 153 N.E. 497.

ISSUE IV. During the direct examination of Police Officer Tryon by the prosecutor, the witness' attention was directed to November 11th and he was asked:

> "And would you tell the jury where you went with the defendant and who went with you?"

The witness replied:

> "At seven o'clock A.M., November 11, 1972, the chief of Detectives, Frank Hoffman, Detective Michaels, and myself, and Indiana State University Officer, Chris Lester accompanied Robert Wayne Austin to

Putnamville, Indiana, the location of the Indiana State Police Post, where a polygraph . . . ."

At the mention of the word "polygraph," defense counsel moved for a mistrial. The motion was denied, but the jury was instructed to disregard the witness' last statement and to give it no consideration when considering the rest of his testimony. Interrogation concerning November the 11th was not resumed.

It is the defendant's contention that the mere mention of the word "polygraph" was so prejudicial as to constitute an "evidentiary harpoon," speculating that the jury would thereby conclude that the defendant had undergone and failed a polygraph examination upon the issue of the crime charged.

The granting of a motion for mistrial rests largely in the discretion of the trial judge. *Bonds* v. *State* (1972), —— Ind. ——, 280 N.E. 2d 313; *White v. State* (1971), 257 Ind. 64, 272 N.E. 2d 312.

If the defendant underwent a polygraph test, such fact should not have been disclosed to the jury—directly or indirectly, but we do not draw the harmful conclusion that the defendant does. The mention of the word "polygraph" was probably erroneous—but harmless. Certainly it did not rise to the level compelling a mistrial within the guidelines set forth in *White v. State* (supra). "Voluntary testimony of witnesses frequently cannot be controlled by counsel during questioning. However, even if the testimony of the witness was prejudicial to the appellant the action of the court in admonishing the jury to disregard the testimony, ordering it stricken from the record and ordering the jury not to consider the same, cured the defect." *McPhearson* v. *State* (1966), 247 Ind. 579, 583, 219 N.E. 2d 907.

We find no reversible error, and the judgment of the trial court is affirmed.

ARTERBURN, C.J. and GIVAN and HUNTER, JJ. concur.

DeBRULER, J. concurs in result.

CERTIFICATION

1173 s 225

Robert Wayne Austin

Vs.

State of Indiana

I, BILLIE R. McCULLOUGH, duly elected, qualified, and acting clerk of the Supreme Court and Court of Appeals of the State of Indiana, hereby certify the above and foregoing is a full, true, complete and exact copy of the original Indiana Supreme Court Opinion, filed November 27, 1974, as the same appears of record in the records of the Supreme Court of the State of Indiana, and of which public records, I am legal custodian.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of my office this 12th day o February, 1975.

BILLIE R. McCULLOUGH, Clerk
INDIANA SUPREME COURT